

Court Appointed Attorneys: Indigent Defense

**2017 CDCAT Winter Conference
San Marcos, TX**

February 9, 2017

**Texas Indigent Defense Commission
Wesley Shackelford, Deputy Director**



Who We Are

Thirteen-member governing board administratively attached to the Office of Court Administration. Jim Bethke is the Executive Director. The Commission has eleven full-time staff.

OFFICERS:

Honorable Sharon Keller Chair – Presiding Judge,
Court of Criminal Appeals

EX OFFICIO MEMBERS:

Honorable Sharon Keller	Austin, Presiding Judge, Court of Criminal Appeals
Honorable Nathan Hecht	Austin, Chief Justice, Supreme Court of Texas
Honorable Sherry Radack	Houston, Chief Justice, First Court of Appeals
Honorable Linda Rodriguez	Hays County
Honorable Brandon Creighton	Conroe, State Senator
Honorable John Whitmire	Houston, State Senator
Honorable Andrew Murr	Junction, State Representative
Honorable Abel Herrero	Robstown, State Representative

MEMBERS APPOINTED BY GOVERNOR:

Honorable Missy Medary	Corpus Christi, Presiding Judge, 5 th Administrative Judicial Region of Texas & Judge, 347th Judicial District Court, Nueces County
Honorable Jon Burrows	Temple, Bell County Judge
Honorable Richard Evans	Bandera, Bandera County Judge
Mr. Alex Bunin	Houston, Chief Public Defender, Harris County Public Defender's Office
Mr. Don Hase	Arlington, Attorney, Ball & Hase

What We Do

Our Purpose

Is to provide financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.

Our Grant Program

In FY 2016 \$31.5 million was disbursed to Texas counties. *Formula grant* awards totaled \$25.1 million to all 254 counties. *Discretionary grants* totaled just over \$6.4 million.

Our Fiscal and Policy Monitoring Program

The Commission monitors each county that receives a grant to ensure state money is being properly spent and accounted for and to enforce compliance by the county with the conditions of the grant, as well as with state and local rules and regulations.

Our Innocence Program

Since 2005, the Commission has provided up to \$100,000 annually to University of Texas School of Law, the Texas Tech University School of Law, the Thurgood Marshall School of Law at Texas Southern University, and the University of Houston Law Center to operate innocence clinics. This funding has contributed towards 11 exonerations. In 2015 the 84th Legislature expanded funding to include \$100,000 per year for two new public law schools at the University of North Texas Dallas College of Law and the Texas A&M University School of Law in Fort Worth.

The Fair Defense Act of 2001

- **Core Requirements:**

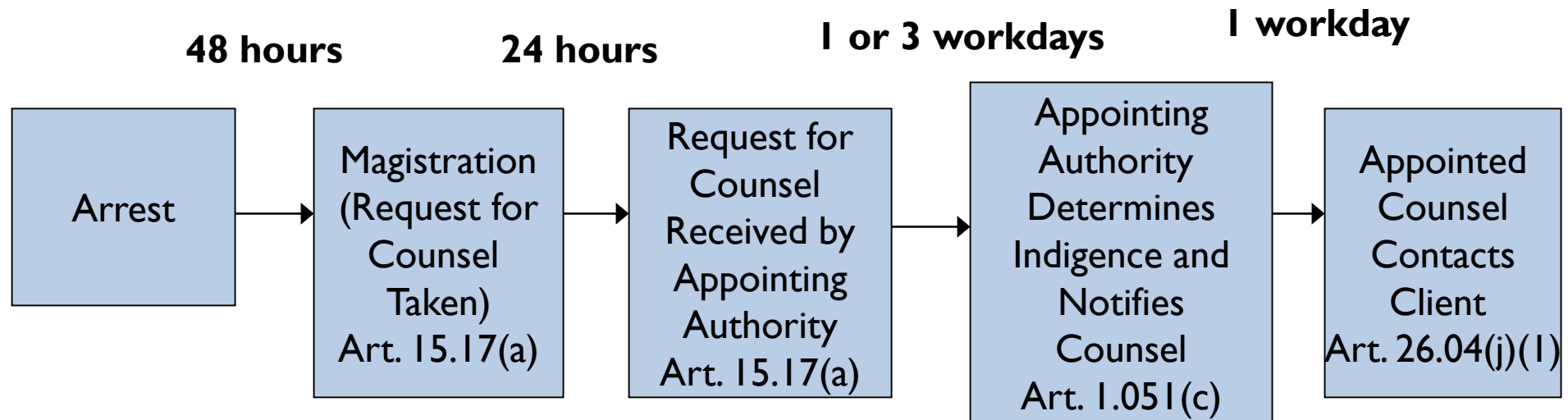
- Prompt and accurate magistration hearings
- Develop a Standard of Indigence and Process to Determine Eligibility
- Minimum Attorney Qualifications
- Timely Appointment of Counsel
- Fair, neutral, and non-discriminatory attorney selection process
- Standard attorney fee schedule and payment process

- **Local Reporting Requirements:**

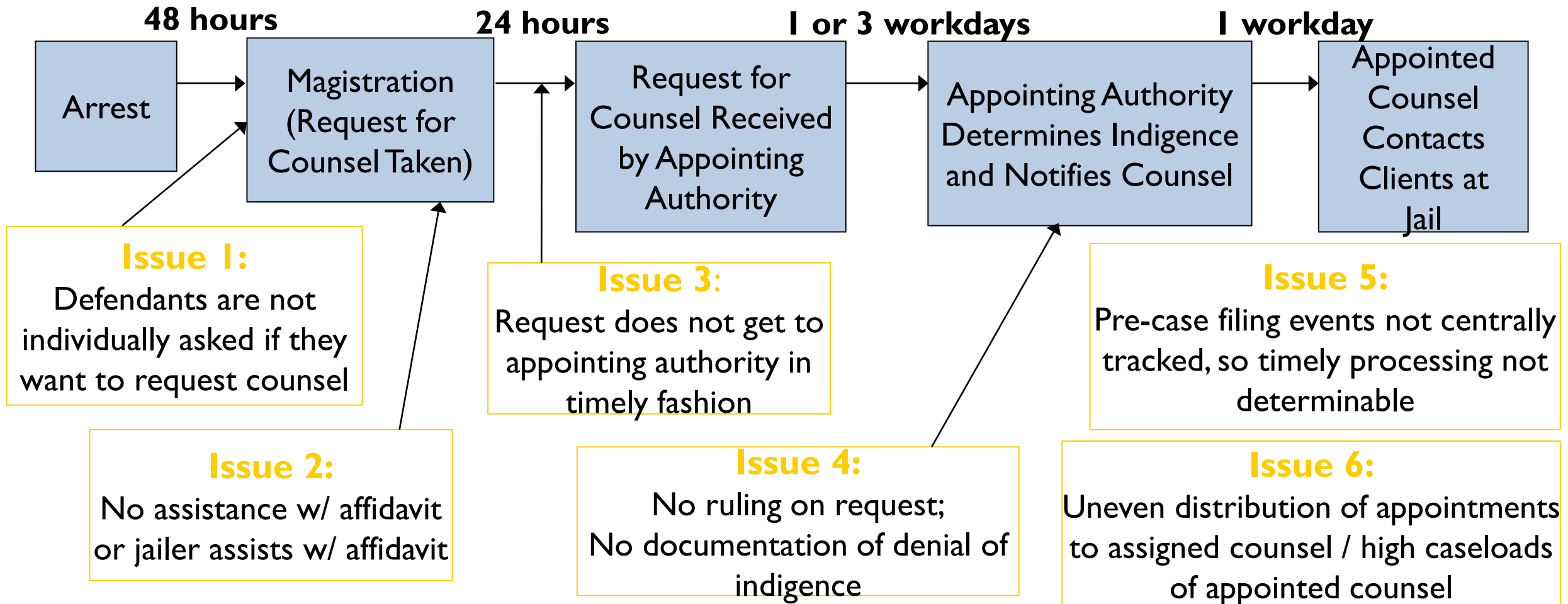
- Indigent Defense Plan (judiciary)
- Indigent Defense Expenditures and Attorney Case Count (auditor/treasurer)
- Practice Time Figures (criminal defense attorneys)

Created Mechanism for (partial) state funding through grants

Timelines for Appointment of Counsel



FRONT END PROCESSING ISSUES



COURT CLERK'S ROLE IN PROCESS

Code of Criminal Procedure Art. 2.21. DUTY OF CLERKS. (a)
In a criminal proceeding, a clerk of the district or county court shall:

(1) receive and file all papers;...

- Records in Clerk's file are critical for judge to know if a request for counsel has been made and ruled upon
 - Invalid waivers of counsel is often the result when not in file

PROMPT AND ACCURATE MAGISTRATION PROCEEDINGS

Texas Code Crim. Proc. Article 15.17

- Hearing within 48 hours of arrest
- Magistrate must inform arrestee of right to appointed counsel
- Record must be made
- Magistrate must ensure reasonable assistance
- If not authorized to appoint counsel, must transmit forms to appointing authority within 24 hours of request

Model Magistrate Warning Form

THE STATE OF TEXAS

Date/Time Of Arrest: _____

COUNTY OF _____

MAGISTRATE WARNING

Before me, the undersigned, magistrate of the State of Texas on this day personally appeared _____, who was given the following warning:

- ☐ You are charged with the offense of _____, ☐ a felony ☐ a misdemeanor.
- ☐ You have a right to hire an attorney to represent you.
- ☐ You have the right to have an attorney present prior to and during any interview and questioning by peace officers or attorneys representing the State.
- ☐ You have the right to remain silent.
- ☐ You are not required to make a statement, and any statement you make can and may be used against you in court.
- ☐ You have the right to stop any interview or questioning at any time.
- ☐ You have the right to have an examining trial (felonies only).
- ☐ You have the right to request appointment of counsel if you cannot afford counsel.

Would you like to request the appointment of counsel? ☐ Yes ☐ No

☐ I explained the local procedures for requesting appointment of counsel in a manner the accused could understand. I provided reasonable assistance in completing necessary paperwork for the appointment of counsel and forwarded the paperwork to the appropriate authority within 24 hours.

Consular Notification

You have the right to speak with your lawyer before answering any questions.

If you are not a United States citizen, you may be entitled to have us notify your country's consular representative here in the United States.

Do you want us to notify your country's consular officials? ☐ Yes ☐ No

What Country? _____

If you are a citizen of a country that requires us to notify your country's consular representative, we shall notify them as soon as possible.

☐ Mandatory Notification Clerk, notify: _____

The State Department's list of foreign consulates can be found at: <http://www.state.gov/s/cpr/rls/fco/>

☐ 1. Accused was arrested as a result of a warrant. County: _____
Proceed to bail section below.

☐ 2. Accused was arrested without a warrant.
Does the Court find probable cause exists for further detention? ☐ Yes ☐ No
If **NO**, accused shall be immediately released. If **YES**, proceed to bail section below.

Bail is set at \$ _____ Bond: ☐ Personal ☐ Cash/Surety

Bond Conditions _____

Time: _____ Date: _____ Magistrate: _____

I acknowledge that I was given the above warning and that I understand my rights as explained to me.

Person Warned: _____ Hearing Interpreted by: _____

STANDARD OF INDIGENCE

Texas Code Crim. Proc. Article 26.04

The court must appoint counsel or determine the person is not indigent in accordance with the county's financial standard.

- Court may consider various factors showing income, assets, and expenses of defendant and defendant's spouse.
- Court may not consider bond or ability to post bond, "except to the extent that it measures the defendant's financial circumstances."

COMMON STANDARDS OF INDIGENCE

- Of the 378 indigent defense plans in Texas, 348 use a percentage of the Federal Poverty Guidelines as the financial standard for determining eligibility.
 - 125% is the most common percentage used (152 plans)
 - 100% (122 plans)
 - 150% (55 plans)
- Other financial standards and tests for indigence include whether the accused:
 - Qualifies for a means-tested public benefit (328 plans)
 - Resides in correctional/mental health facility (305 plans)
 - Income less than necessary expenses per month (58 plans)

USEFUL LINKS

■ County Plans

<https://tidc.tamu.edu/public.net/>

■ Model Forms

<http://www.tidc.texas.gov/policies-standards/model-forms-procedures.aspx>

Methods of Obtaining Financial Information

- Screening – an interview in which the defendant is asked about expenses, income, and assets
- If the defendant has a contact number, he/she probably has expenses. If a defendant has expenses, he/she probably has some form of income.
- To obtain information about defendants status, you must invest the time to obtain the information.

<http://www.tidc.texas.gov/media/40461/effective-indigence-screening-final.pdf>

Model Affidavit of Indigence

AFFIDAVIT OF INDIGENCE

THIS PORTION TO BE COMPLETED BY OFFICE PERSONNEL ONLY			
The State of Texas vs.		_____ County Court _____ District Court	
Offense:	Felony/Misd:	Interpreter required? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Offense:	Felony/Misd:	If yes, language required:	
Offense:	Felony/Misd:		
Defendant Currently In: <input type="checkbox"/> Correctional Facility <input type="checkbox"/> Mental Health Facility			
THIS PORTION TO BE COMPLETED BY OR WITH DEFENDANT			
Name _____		Date of Birth _____ / _____ / _____	
First Name	MI	Last Name	
Address _____		_____	
Street	Apt No.	City	State Zip Code
Phone Numbers _____		_____	
Home	Cell	Work	Family Member
I receive: <input type="checkbox"/> Medicaid <input type="checkbox"/> SSI <input type="checkbox"/> SNAP <input type="checkbox"/> TANF <input type="checkbox"/> Public Housing			
Are you Employed? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, where? _____		Type of Work _____	
Number of Hours per Week: _____		How long have you worked at this job? _____	
Marital Status : <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed <input type="checkbox"/> Separated			
Name of Spouse _____			
First		Last	
Name of Dependent Child(ren) (0-18 yrs.)		Age	Name of Dependent Child(ren) (0-18 yrs.)
RESIDENCE INFORMATION			
Rent: yes or no	Own: yes or no	Reside with family: yes or no	Homeless: yes or no
MONTHLY INCOME AND ASSETS		MONTHLY EXPENSES	
My take home pay	\$	Rent/Mortgage	\$
Spouse's take home pay	\$	Utilities (Elec., Gas, Water)	\$
Child Support (Received)	\$	Total Child Expenses (Including Child Support Paid)	\$
SNAP (Food Stamps)	\$	Total Food Expenses	\$
Social Security/Disability	\$	Transportation Costs	\$
Other Government Check	\$	Cell/home phone	\$
Other Income	\$	Probation fees	\$
Assets (car, house, etc.)	\$	Medical Expenses / Health Insurance	\$
TOTAL MONTHLY INCOME AND ASSETS	\$	Minimum Monthly Credit Card Payment	\$
		TOTAL MONTHLY EXPENSES	\$

Timely Appointment of Counsel or Denial of Indigence

Texas Code Crim. Proc. Article 1.05 I

- Must appoint counsel /deny indigence within 1 or 3 working days of receipt of request (counties over/under 250,000 population)
- Appointing authority should document appointment or denial to ensure proof of statutory compliance

Timely Appointment of Bonded Defendants

- **Rothgery v. Gillespie County, 554 US 191 (2008).**

A criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

- **I TAC § 174.51 INDIGENT DEFENSE PLAN REQUIREMENTS.**

The countywide procedures adopted under Art. 26.04(a), Code of Criminal Procedure, must provide a method to allow defendants to obtain the necessary forms for requesting appointment of counsel and to submit completed forms for requesting appointment of counsel at any time after the initiation of adversary judicial proceedings. *Effective date: 4/13/2015, 40 TexReg 2087*

Waivers of Counsel – to speak with prosecutor

Texas Code Crim. Proc. Article 1.051

- A defendant may voluntarily and intelligently waive in writing the right to counsel.
- A waiver obtained in violation of Subsection (f-1) or (f-2) is presumed invalid.
- Prosecutor may not communicate with defendant who has requested appointment of counsel unless court has denied the request
- Court must advise defendant of procedures for requesting counsel

Waiver of Counsel for Purposes of Speaking with a Prosecutor

JUDGE'S EXPLANATION OF RIGHTS TO DEFENDANTS WITHOUT ATTORNEY

As a defendant in a criminal case, you have three options:

1. You may hire an attorney;
2. If you do not have enough money to hire an attorney, you may request an attorney be appointed to represent you;
3. You may represent yourself.

If you want an attorney to represent you and have enough money to hire an attorney, the case will be reset to give you time to do so.

If you want an attorney and do not have the money to hire one, you will need to fill out a financial questionnaire so that the proper person can determine whether or not to appoint an attorney to represent you.

You may not speak to the prosecutor about your case unless you sign a written waiver of your right to be represented by an attorney.

Be aware that there are dangers to self-representation. Waiving your right to an attorney and representing yourself may result in a worse outcome for you and your case, including the loss of significant legal rights and opportunities relating to military service, possession of a firearm, housing and public benefits, child custody, immigration status for non-citizens, and employment.

If you choose to proceed without an attorney, you may change your mind at any time and may request counsel from the Court.

Judge Presiding

DEFENDANT'S CHOICE [mark initials next to only **ONE** choice]

_____ I want to reset this case to hire my own attorney.

_____ I have hired an attorney, whose name is: _____

_____ I want to apply for court-appointed counsel.

_____ I have a court-appointed attorney, whose name is: _____

_____ I want to waive my right to an attorney and represent myself.

Defendant: _____ Date: _____

Waivers of Counsel – to enter a plea

Texas Code of Crim. Proc. Article 1.05 I

(g) If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant of the nature of the charges against the defendant and, if the defendant is proceeding to trial, the dangers and disadvantages of self-representation. If the court determines that the waiver is voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings:

"I have been advised this _____ day of _____, 2 _____, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)"

Waiver of Counsel for Purposes of Entering a Guilty Plea

WAIVER OF COUNSEL FOR PURPOSES OF ENTERING A GUILTY PLEA OR PROCEEDING TO TRIAL

I have been advised of the nature of the charges against me and the dangers and disadvantages of self-representation. My waiver is voluntarily and intelligently made. Furthermore,

I have been advised this _____ day of _____, 20 ____, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel.

Defendant

Date: _____

I have determined that this waiver is voluntarily and intelligently made.

Judge Presiding

Date: _____

REQUEST FOR COUNSEL CHECKLIST

1. MAGISTRATION REQUIREMENTS UNDER ARTICLE 15.17, CCP

<input type="checkbox"/>	Arrestees must be taken before a magistrate within 48 hours of arrest and informed of their rights, including their right to request counsel.
<input type="checkbox"/>	The magistrate must inform the person arrested of the procedures for requesting appointment of counsel and ensure reasonable assistance in completing the necessary forms for requesting counsel.
<input type="checkbox"/>	The magistrate must make a record of: <ol style="list-style-type: none"> (1) informing the person of the right to counsel; (2) asking the person if they want to request counsel; and (3) whether the person requested counsel or not.
<input type="checkbox"/>	If the magistrate is authorized to appoint counsel, the magistrate shall appoint counsel or determine that the person is not indigent.
<input type="checkbox"/>	Otherwise, the magistrate must transmit the request to the appointing authority within 24 hours.

2. APPOINTMENT OF COUNSEL UNDER ARTICLE 1.051 AND 26.04, CCP

<input type="checkbox"/>	Upon receipt of the request for counsel, the appointing authority has 3 working days (for counties under 250,000) or 1 working day (for counties larger than 250,000) to rule upon the request and either appoint counsel or determine that the person is not indigent.
<input type="checkbox"/>	The appointing authority must appoint counsel or determine that the person is not indigent in accordance with the county's financial standard, as set in the local indigent defense plan.
<input type="checkbox"/>	Once appointed, counsel must make every reasonable effort to contact the client within 1 working day and interview the client as soon practicable.

3. INITIAL APPEARANCE REQUIREMENTS UNDER ARTICLE 1.051, CCP

<input type="checkbox"/>	The court must advise the defendant of the right to counsel and the procedure for requesting appointed counsel. The court must give the defendant a reasonable opportunity to request appointed counsel before directing or encouraging the defendant to speak with the prosecuting attorney.
<input type="checkbox"/>	Any waiver of counsel by a defendant who has requested appointed counsel must occur after the court has determined the defendant is not indigent, and the defendant: 1) has been given a reasonable opportunity to retain counsel; or 2) has waived the opportunity to retain counsel.
<input type="checkbox"/>	A prosecutor may speak to a defendant who has requested appointed counsel only if the court has determined the defendant is not indigent, and the defendant: 1) has been given a reasonable opportunity to retain counsel; or 2) has waived the opportunity to retain counsel.
	Any waiver obtained from a defendant in violation of the above provisions is presumed invalid.
<input type="checkbox"/>	If a defendant wishes to waive the right to counsel in order to enter a guilty plea, the court must advise the defendant of the nature of the charges against him and, if the defendant is proceeding to trial, the dangers and disadvantages of self-representation.
<input type="checkbox"/>	If a defendant pleads guilty without counsel, the court must determine that the waiver is voluntarily and intelligently made and must provide the defendant with a statement in substantially the following form: <i>"I have been advised this ___ day of ___, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)."</i>

Attorney Selection process

- **Texas Code Crim. Proc. Article 26.04(b)(6)**

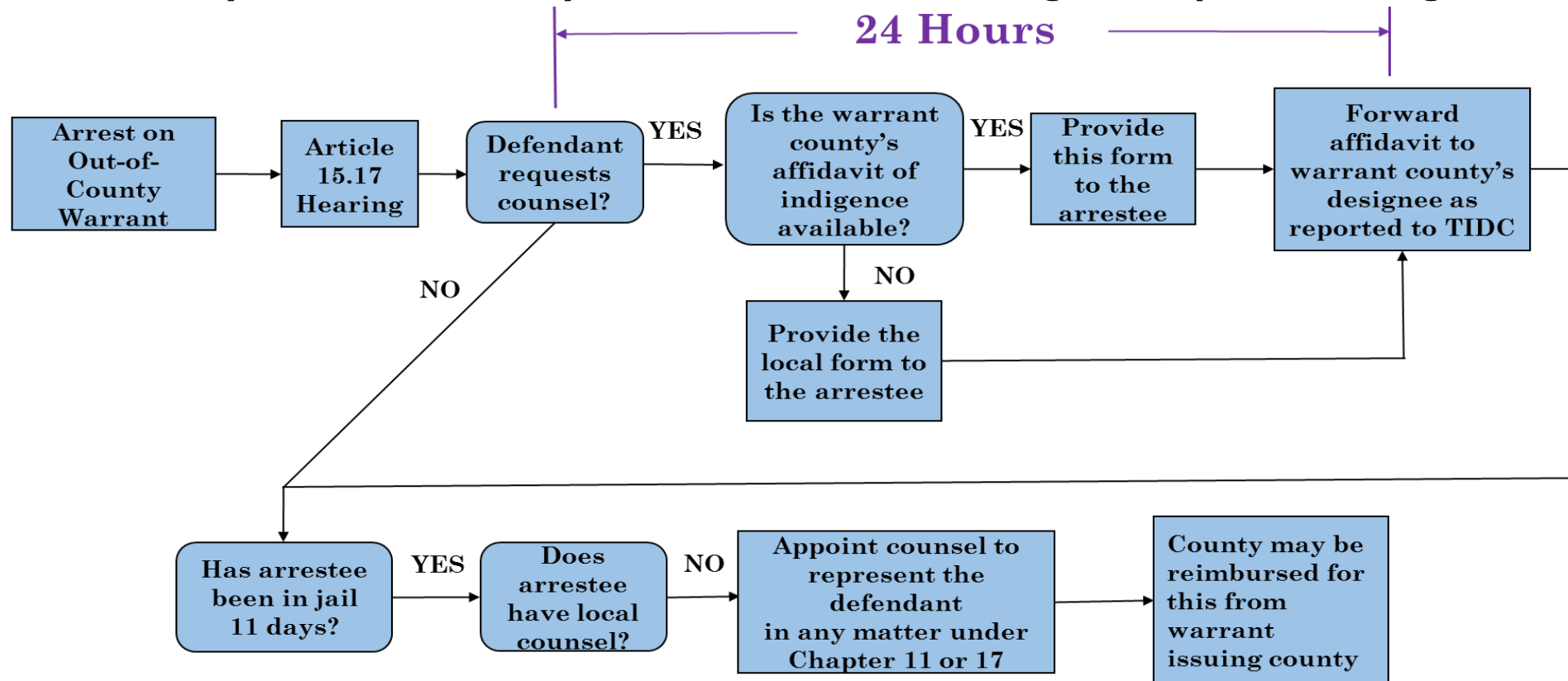
Procedures shall ensure that appointments are allocated in a manner that is fair, neutral, and non-discriminatory

- **I TAC § 174.28(c)(5)(C)**

A County is presumed to be in substantial compliance if percentage of appointments of the top 10% of recipient attorneys does not exceed three times their respective share.

COUNSEL FOR OUT OF COUNTY ARRESTEES

Clarifies the procedures for appointment of counsel for a person arrested and jailed in a county based on a warrant issued by a different county, which has been confusing under prior existing law.



Out of County Arrest Contacts:

<http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>

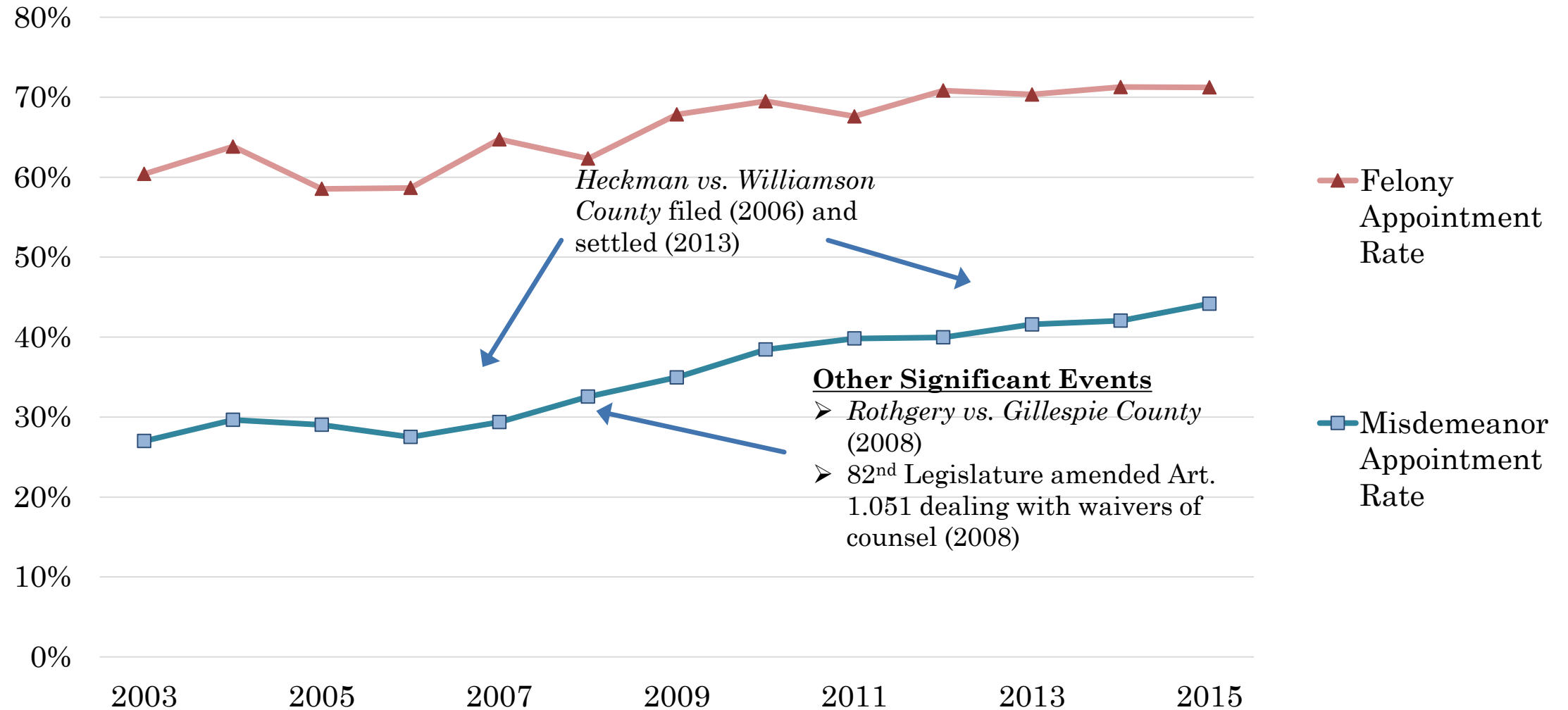
Decreasing Rates of Pro Se Misdemeanor Defendants

- Since 2011, when OCA began tracking the number of retained cases, the percentage of pro se misdemeanor cases has decreased

% of Pro Se Misdemeanor Dispositions	FY 11	FY 12	FY 13	FY14	FY15
Statewide	33.2%	28.8%	27.5%	25.4%	23.8%
Counties Under 50k Pop.	68.7%	66.3%	66.4%	63.5%	61.7%
Counties Between 50k & 250k Pop.	56.9%	50.8%	48.4%	46.6%	42.5%
Counties Over 250k Pop.	19.6%	15.2%	13.3%	11.6%	11.3%

- The number of pro se dispositions can be estimated by the following formula:
 - $\text{Pro Se Dispositions} = \text{Total Dispositions} - \text{Total Retained Cases} - \text{Total Cases in Which Attorneys were Paid}$

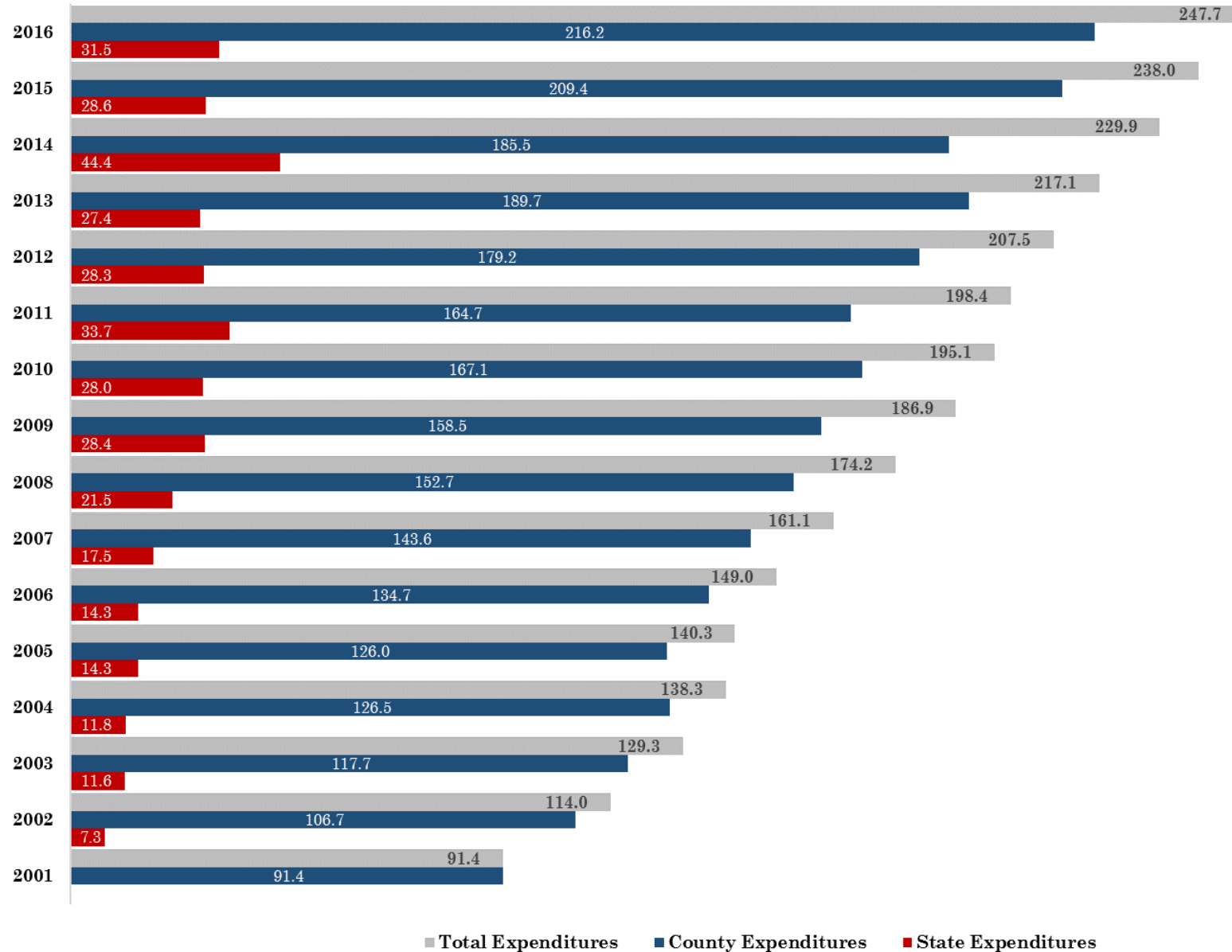
Since Passage of the FDA, Appointment Rates Have Increased



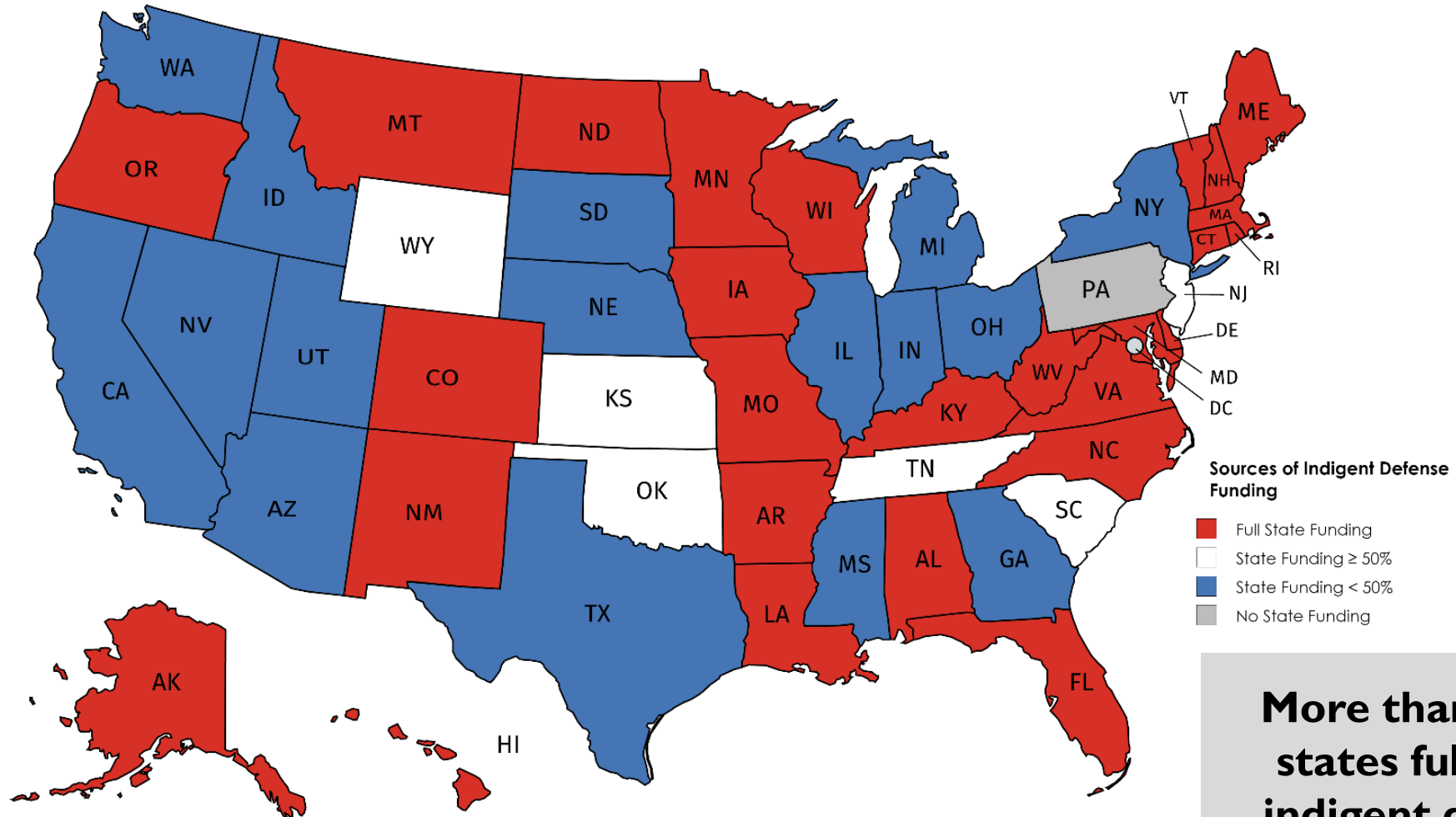
85th Legislative Session

Funding Levels & Hot Topics in 85th Legislative Session

Texas Indigent Defense Expenditures (in millions) by Fiscal Year



STATE FUNDING OF INDIGENT DEFENSE



**More than half of
states fully fund
indigent defense.**

Legislative Appropriations Request (LAR)

Request for 2018/19:

- Restore 4 Percent Reduction in Base Funding - \$2.87 million
- Support 50/50 State-County Funding for Statewide Regional Public Defender Office for Capital Cases (RPDO) - \$2.9 million
- Support Statewide Funding for Early Identification and Representation of Defendants with Mental Illness - \$10 million
- Fully Funding Criminal Indigent Defense - \$212.2 million
 - 50% funding in FY18/19
 - 75% FY20/21
 - 100% FY22/23

Hot Topic: Pre-Trial Release Practices

- Texas Judicial Council studied pre-trial practices and found:
 - Percent of inmates in Texas jails awaiting trial has increased from 32% in 1994 to 75% today
 - 3 Days Count
 - Worse Outcomes in court
 - Higher recidivism
 - Collateral consequences

Hot Topic: Pre-Trial Release Practices

- Texas Judicial Council recommends:
 - Validated Risk Assessment pre-15.17 hearing
 - Presumption of personal bond (but judicial discretion)
 - Permit pre-trial detention of high risk defendants without bail
 - Require judicial findings & hearing

Hot Topic: Pre-Trial Release Practices

- House Criminal Jurisprudence and House County Affairs Committees joint charge to:

“Review pretrial service and bonding practices throughout the state. Examine factors considered in bail and pre-trial confinement decisions, including the use of risk assessments; assess the effectiveness and efficiency of different systems in terms of cost to local governments and taxpayers, community safety, pretrial absconding rates and rights of the accused.”

Hot Topic: Pre-Trial Release Practices

- Senate Criminal Justice Committee recommendations:
 - Mandate greater use of pretrial risk assessment & PR bonds for non-violent offenders
 - Least restrictive conditions based on D's risk factors
 - Permit “rocket dockets” for certain low-level offenses that affect those with mental illness disproportionately with time-frames for disposition (e.g. 30 days)

“Hot Topics”: Mental Health / Criminal Justice

- Senate Health & Human Services Committee made recommendations:
 - Expand Capacity of inpatient forensic beds at state hospitals
 - Senate Criminal Justice Cmte also recommends this
 - Contracting community forensic beds (closer to home / cheaper)
 - Expand successful Outpatient Competency Restoration Programs
 - Consider restricting commitment to a state hospital if charged with a Class B misdemeanor

“Hot Topics”: Mental Health / Criminal Justice

- House Select Committee on Mental Health was charged with a broad review of mental health services and programs across agencies. Recently released report made recommendations:
 - Expand crisis intervention & jail diversion programs (esp. regional crisis intervention teams)
 - Review suspension rather than “termination” of Medicaid benefits for those in jail.
 - Provide judges more options to restore competency (jail and outside of jail / not just state hospitals)
 - Require more judicial education on how to address mental health issues.
 - Require collection of consistent data to evaluate specialty court outcomes